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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 894

MOSE REED

Petitioner,

versus

MV FOYLEBANK, her engines, tackle, apparel, and furniture, and BANK LINES LIMITED, and STRACHAN SHIPPING COMPANY,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNGAR, DULITZ & MARTZELL
John R. Martzell
328 Chartres Street-Suite 100
New Orleans, Louisiana 70130
Attorneys for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

MOSE REED

Petitioner,

versus

MV FOYLEBANK, her engines, tackle, apparel, and furniture, and BANK LINES LIMITED, and STRACHAN SHIPPING COMPANY

Defendants.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mose Reed, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 29, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section A, enter-

ing Judgment against Petitioner Mose Reed and against Defendant M/V FOYLEBANK and Bank Lines Limited printed in Appendix "A" is unreported.

The Findings of Fact and Conclusions of Law of the Judge of the United States District Court, Eastern District of Louisiana, Section A printed in Appendix "B" is unreported.

The Opinion of the United States Court of Appeals for the Fifth Circuit printed in Appendix "C" is reported at ____ F.2d. ____.

No application for rehearing was filed.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254(1) United States Code.

QUESTIONS PRESENTED

(1) In a personal injury action by a longshoreman against a vessel and its owner based on unseaworthiness, does a finding that the cause of the injury was an improper loading plan adopted by the stevedore render the vessel unseaworthy?

(2) Has the defense of operational negligence as a defense to an action based on unseaworthiness been eliminated by the decision of this Court in *Waldron v. Moore-McCormack*, 386 U.S. 724 and *Mascuilli v. United States*, 387 U.S. 237?

JURISPRUDENCE INVOLVED

(1) *Waldron v. Moore-McCormack,* 386 U.S. 724.

(2) *Mascuilli v. United States,* 387 U.S. 237.

(3) *Grigsby v. Coastal Marine Service of Texas, Inc.,* (5 Cir.) 412 F.2d 1011.

(4) *Luckenbach Overseas Corporation and Isthmian Lines, Inc. v. Usner,* (5 Cir.) 413 F.2d 984.

(5) *Duncan v. Transeastern Shipping Corporation,* (5 Cir.) 413 F.2d 1023.

(6) *Neal v. Lykes Bros. Steamship Co.,* (5 Cir.) 306 F.2d 313.

(7) *Radovich v. Cunard Steamship Co., Ltd.,* (2 Cir.) 364 F.2d 149.

(8) *Skibinsky v. Waterman Steamship Corp.,* (2 Cir.) 360 F.2d 539.

(9) *Ferrante v. Swedish American Lines,* (3 Cir.) 331 F.2d 571.

(10) *Scott v. Isbrandtsen Co., Inc.,* (4 Cir.) 327 F.2d 113.

(11) *Thompson v. Calmar Steamship Corp.,* (3 Cir.) 331 F.2d 657.

(12) *Blassingill v. Waterman Steamship Corp.,* (9 Cir.) 336 F.2d 367.

STATEMENT OF THE CASE

The general facts are properly set forth in the opinion of the United States Court of Appeals for the Fifth Circuit as follows:

"On the morning of October 16, 1962, appellant and four other longshoremen were loading crates of pulpboard aboard the M/V Foylebank. Each crate weighed approximately 1100 pounds and was encircled by seven steel bands. The crate in issue was marked with the notation 'USE NO HOOKS'. The crew was not furnished with any mechanical devices or other implements such as a fork lift truck, crow bars, 'greasy pigs' rollers, pry bars or jacks, to move the crates; the longshoremen had only their hand hooks to assist in the movement. The crates were lowered into the hold by winch and cargo boom and were then to be moved to the wings by the longshoring crew.

"One of the crates had been loaded and the five-man stevedoring crew was in the process of placing the second one. Mose Reed placed his hand hook behind one of the steel bands and was pulling the crate into place. The steel strap suddenly broke and appellant stumbled backwards, striking his back on the crate that had already been secured. His injuries were serious and painful but need not be further discussed in view of the result below and here.

"Appellant brought libel in rem against the vessel and in personam against the owner, Bank Lines, Limited (Vessel). Vessel impleaded Strachan Shipping Company (Stevedore), appellant's employer. The district Court dismissed the libel with prejudice, and of course

likewise dismissed Vessel's indemnification suit against Stevedore. The district court found that there was no proof of unseaworthiness of the vessel or the cargo."

The District Court held that the cause of the accident was the improper method of loading these crates with hand hooks and the "operational negligence" of the longshoremen. See Findings of Fact Nos. 8, 11, 15, Conclusions of Law Nos. 3, 4, 5, Appendix B. The District Court found that proper equipment was not supplied by the stevedore, Finding of Fact, No. 9. Appendix B and that pulling on steel cargo bands with hand hooks was a long accepted and customary practice for longshoremen. Conclusions of Law No. 5, Appendix B. The District Court concluded that the vessel was not unseaworthy despite these findings and entered judgment for Defendants on January 4, 1967.

Mose Reed filed a direct appeal to the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court by a written opinion attached as Appendix C on August 29, 1969.

From that decision of the Fifth Circuit Mose Reed now seeks a writ of certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

There is a conflict among the United States Circuit Courts of Appeal as to whether an improper loading plan adopted by the stevedore creates an unseaworthy condition on the vessel.

Prior to the instant decision the Fifth Circuit Court of Appeals had apparently agreed with the majority of United States Courts of Appeal and the Supreme Court that the actions of a stevedore might in themselves create an unseaworthy condition. See *Neal v. Lykes Bros. Steamship Co.* (5 Cir.) 306 F.2d 313, 315. No case in the Fifth Circuit prior to the instant case has precisely dealt with the distinction between a "bad loading plan" and a "good plan negligently executed." "Bad plan" cases in other Circuits have traditionally been dealt with in the Fifth Circuit as variations on the defense of "operational negligence." See *Antoine v. Lake Charles Stevedores, Inc.*, (5 Cir.) 376 F.2d 443; *Robichaux v. Kerr McGee Oil Industries, Inc.*, (5 Cir.) 376 F.2d 447; *Dugas v. Nippon Yusen Kaisha*, (5 Cir.) 378 F.2d 271. The distinction is simply that a bad loading or unloading plan is in itself a "condition" and if injury occurs in the course of executing the plan and as a result of the plan then the vessel is unseaworthy. This is of course different from the momentary careless act which causes injury in the course of an otherwise proper loading procedure. The distinction is made clear in the Second Circuit in *Radovich v. Cunard Steamship Co.*, (2 Cir.) 364 F.2d 149

which reversed a finding of seaworthiness wherein a plan of unloading was alleged to be improper with this explanation at 364 F.2d at 153:

> "... there is a difference between an unsafe plan of operation, which creates a dangerous condition from the beginning of its execution, and a faulty execution of a proper plan."

The equation of an "unsafe loading or unloading plan" with unseaworthiness has been followed in the Second Circuit, see *Radovich*, supra; *Skibinsky v. Waterman Steamship Corp.*, (2 Cir.) 360 F.2d 539, the Third Circuit, *Ferrante v. Swedish American Lines*, (3 Cir.) 331 F.2d 571; *Thompson v. Calmar Steamship Corp.*, (3 Cir.) 331 F.2d 657, the Fourth Circuit, *Scott v. Isbrandtsen Co., Inc.*, (4 Cir.) 327 F.2d 113 and the Ninth Circuit, *Blassingill v. Waterman Steamship Corp.*, (9 Cir.) 336 F.2d 367. In the instant case the District Court squarely held that the plan being used to load these heavy crates with hand hooks alone was of long-standing and a customary practice and that this method was improper. The Fifth Circuit in the instant case ignores the distinction between a "bad plan" and "a good plan negligently executed" and subsumes the "bad plan" concept under the operational negligence defense. The Fifth Circuit states categorically at p. 5 Appendix C.

> "The second issue is whether the operational negligence, i.e. improper loading plan, of stevedore and appellant is synonymous with unseaworthiness. If so, operational negligence as

> a defense to unseaworthiness would be abolished. Moreover any operational negligence would instantaneously render a vessel unseaworthy even though all the equipment and appurtenances aboard the ship were admittedly seaworthy. This question is decided against appellant in this Circuit."

In short, facts which create a cause of action for a longshoreman in the Second, Third, Fourth, and Ninth Circuits create any absolute defense for the shipowner in the Fifth Circuit.

Petitioner submits that the accident of geography in the work place of a longshoreman should not be the difference between a cause of action and a defense to the cause of action. Hence Petitioner respectfully submits that this Court should grant writs to resolve the conflict.

II.

The United States Courts of Appeal are divided on whether the "operational negligence" of a Stevedore is a defense to a claim of unseaworthiness by a longshoreman against a vessel.

The United States Courts of Appeal have given directly opposite interpretations of this Court's per curiam opinion in *Mascuilli v. United States*, 387 U.S. 237. The result is that maritime workers in New York and Baltimore can achieve recovery for their injuries and maritime workers in New Orleans and San Fran-

cisco can be denied recovery for their injuries on the same set of facts.

The issue is whether the negligent act of a stevedore or an individual longshoreman renders a vessel unseaworthy in light of the *Mascuilli* decision or on the basis of sound law whatever *Mascuilli* may mean. See *Waldron v. Moore-McCormack,* 386 U.S. 724. The Second Circuit and the Fourth Circuit say that it does. *Candiano v. Moore-McCormack Lines, Inc.* (2 Cir.) 382 F.2d 961; *Alexander v. Bethlehem Steel Corporation,* (2 Cir.) 382 F.2d 963; *Cleary v. United States Lines,* (2 Cir.) 411 F.2d 1009; *Venable v. A/S Det Forenede Dampskelesselskab* (4 Cir.) 399 F.2d 347. The Fifth Circuit and the Ninth Circuit say that it does not. *Grigsby v. Coastal Marine Service of Tex. Inc.,* (5 Cir.) 412 F.2d 1011; *Luckenbach Overseas Corporation and Isthmian Lines, Inc. v. Usner* (5 Cir. 1959) 413 F.2d 984; *Duncan v. Transeastern Shipping Corporation,* (5 Cir. 1969) 413 F.2d 1023; *Reed v. MV Foylebank,* (5 Cir. 1969) ____ F.2d ____ [No. 24488 Aug. 29, 1969]; *Tim v. American President Lines, Ltd.,* (9 Cir.) 409 F.2d 385.

CONCLUSION

This is the classic judicial confrontation which supports the certiorari jurisdiction of this Court. The maritime law controlling four of the largest ports in the nation is in direct conflict. The maritime industry and those citizens who suffer injury while serving that industry deserve a uniform rule of law. This can only be achieved by this Court's issuing the writs requested by Petitioner and resolving the conflict.

Respectfully submitted,

UNGAR, DULITZ & MARTZELL
328 Chartres Street-Suite 100
New Orleans, Louisiana 70130
Telephone: 523-6504

By: _____
John R. Martzell

PROOF OF SERVICE

I, John R. Martzell, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Mr. J. Dwight LeBlanc, Jr.
CHAFFE, McCALL, PHILLIPS, BURKE, TOLER, HOPKINS & SARPY
1500 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

Mr. Stuart A. McClendon
520 Imperial Office Building
3301 N. Causeway Boulevard
Metairie, Louisiana 70002

by mailing a copy thereof, postage prepaid addressed to their respective offices, this ____ day of November, 1969.

_____
John R. Martzell

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MOSE REED

versus Section "A"
No. 5562 Admiralty

BANK LINES, LTD.

JUDGMENT

The Court having on December 28, 1966 found that defendant vessel owner is entitled to a judgment against the plaintiff longshoreman, and the suit of plaintiff is accordingly dismissed with prejudice and costs; and the Court having further found that the third-party suit is dismissed as to Strachan Shipping Company, but there is to be judgment in favor of the Bank Line, Ltd., defendant, and against Strachan Shipping Company, third-party defendant, for breach of warranty and for costs, disbursements and attorneys' fees, and if the amount so due cannot be agreed upon by the parties concerned, the matter will be set down for hearing at a later date;

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of respondent, Bank Lines, Ltd., owner of the M/V Foylebank, her engines, tackle, apparel, and furniture, and

against libelant, Mose Reed, dismissing said libelant's suit with prejudice and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third-party plaintiff, Bank Line, Ltd., and against third-party defendant, Strachan Shipping Company, for breach of warranty and for costs, disbursements and attorneys' fees, and if the amount so due cannot be agreed upon by the parties concerned, the matter will be set down for hearing at a later date.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the third-party complaint filed by Bank Line, Ltd. against Strachan Shipping Company be, and the same is hereby, DISMISSED in compliance with the above order.

Dated at New Orleans, Louisiana on this 4th day of January 1967.

/s/ HERBERT W.
CHRISTENBERRY
UNITED STATES
DISTRICT JUDGE

James A. Wysocki, Esq.
Leonard Ungar, Esq.
Leon Sarpy, Esq.
Dwight LeBlanc, Esq.

Stuart McClendon, Esq.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Filed: December 29, 1966

MOSE REED

versus

Admiralty
No. 5562

BANK LINES, LTD.

versus

STRACHAN SHIPPING COMPANY,
Third Party Defendant

CHRISTENBERRY, J.

This matter came on for trial before the Court on a former day, and after hearing the evidence and arguments of counsel, and considering the briefs filed by counsel, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Mose Reed was an experienced longshoreman employed by Strachan Shipping Co. on October 16, 1962, at which time the M/V FOYLEBANK was moored starboard side on the Mississippi River

in the harbor of New Orleans at the Harmony Street Wharf.

2. Strachan Shipping Company, an independent master stevedore, had contracted to load various cargoes aboard the M/V FOYLEBANK, which loading operation was under their complete charge and direction.

3. On the occasion in question, Mose Reed was working in hatch No. 6, 'tween deck area, of the M/V FOYLEBANK on the offshore side, with four fellow longshoremen.

4. At about 10:15 A.M. a certain crate of pulpboard or some comparable cargo, weighing approximately 1100 lbs., had been deposited in the square of the hatch. The crate was made up by St. Regis Paper Company in such a manner that it sat with a wooden frame on all four corners on a wooden platform with skids, and the entire unit was then encircled by seven steel bands or straps, which crate was marked with the notation "USE NO HOOKS."

5. Mose Reed and four fellow longshoremen were attempting to move this 1100 pound crate unit a distance of about eight to ten feet to the offshore side, without any fork lift machine, jacks or crowbars, and only with hand hooks used by longshoremen. Mose Reed was the only longshoreman who had his hand hook into one of the steel bands around the package. Mose Reed and John Perkins, one of the longshoremen,

were in the front of the crate and John Perkins had his hand hook in the wood corners. Mose Reed had one of the wood corners available in which he could have used his hook. None of the other longshoremen attempting to move the crate had his hand hook in the steel straps. On previous occasions the longshoremen had observed such steel bands break when they were pulled on by hand hooks, not an unusual occurrence along the river front.

6. Mose Reed had his two hands on his hand hook, and pulled with all his might on the steel band, and it parted. Plaintiff had his feet improperly placed and he fell backwards, as a result of which plaintiff contends that he was injured.

7. After the accident no one looked at the band, nor could any witness tell what happened to the broken band. The hand hook was owned by Mose Reed.

8. No ship officer or personnel was in the vicinity when the accident occurred, or knew anything of the accident, except what was told to them by Strachan Shipping Co. employees, and the vessel's officers and crew were not aware of the improper manner of loading by using hand hooks in the steel bands, which hand hooks the stevedore's longshoremen were using to load the cargo.

9. The skids on the crate made it suitable to being moved by fork lift truck, platform jacks or crowbars or pry bars, none of which was supplied by Strachan Shipping Company.

10. The steel bands around the crate were fit and proper for the purpose of containing the contents of the package and holding it onto the wooden platform and skid, which steel bands were 3/4 inches wide by .020 thousands of an inch thick. There was no evidence that the steel band was in any way defective or inadequate.

11. The steel bands were not made to be pulled on with hand hooks, which pulling can cause the band to be fractured, kinked or cut, which weakens the band and allows it to part. It is an improper and unsafe practice to use the hand hook on such steel bands, even though it may have been customary at Strachan Shipping Co., but not necessarily with all stevedores in the port of New Orleans.

12. A preponderance of the testimony established that the bands were not intended to be used in manhandling cargo with hand hooks.

13. Plaintiff gave confusing, incomplete and inconsistent explanations of what occurred, and was careless and negligent in not taking a proper stance when placing his hand hook in the steel band in attempting, with all his might, with two hands on his hook, to drag the 1100 lb. crate.

14. There is no evidence that the vessel or crate in question was unseaworthy for their intended purpose in this situation.

15. The plaintiff Mose Reed is not entitled to judgment as he has not proved that the vessel was in any

way unseaworthy. The improper method of handling the crates is operational negligence for which no recovery can be allowed under the law against the vessel owner.

CONCLUSIONS OF LAW

1. The burden of proving unseaworthiness of a vessel rests entirely upon the plaintiff. The mere breaking of a steel band such as the one in this case does not render the vessel unseaworthy. *Freitas v. Pacific-Atlantic Steamship Company,* 218 F.2d 562, 1955 AMC 649 9th Cir., 1955); *Russo v. United States,* 183 F.Supp. 673, 1960 AMC 367 (E.D. N.Y. 1958).

2. The 1100 pound crate, including the steel bands, and also the vessel were reasonably fit for their intended use, and the vessel owner is not obliged to furnish an accident-free ship. *Mitchell v. Trawler Racer,* 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 1941 (1960); *Green v. Skibs,* 186 F.Supp. 459 (E.D. S.C. 1960); *Phipps v. N.V. NEDERLANDSCHE AMERIKAANSCHE S.M.,* 259 F.2d 143 (9th Cir., 1958).

3. The improper manner of loading, in this case by plaintiff placing his hand hook under the steel band to move the 1100-lb. skid, was "operational negligence" by the contract stevedore, and is of itself an insufficient basis to sustain a finding of unseaworthiness. Spinelli v. Isthmian Steamship Co., 326 F.2d 870, 1963 AMC 1814 (2nd Cir., 1964), cert. denied 377 U.S. 935 (1964), rehearing denied 377 U.S. 1010 (1964); *Puddu v. Royal Netherlands Steamship Co.,* 303 F.2d 752, 1962 AMC 419 (2nd Cir., 1962) cert. denied 371 U.S. 840 (1962).

4. The stevedore, Strachan Shipping Co., third party defendant, during a step or phase of a typical and routine operation, abused the use of seaworthy equipment in that the 1100 pound skid which was not defective in any way, and which they could have safely handled with a fork lift truck which could have been placed in the hold, platform jacks or pry bars, was handled with hand hooks, and the abuse of equipment does not render the vessel unseaworthy, in the instant case it is only "operational negligence." *Spinelli v Isthmian Steamship Co.*, supra; *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F.2d 397, 1954 AMC 1111 (2nd Cir. 1954), *Guiseppe di Vittorio v. Skiles a/s Siljestad*, 1965 AMC 728 (D.C.NY. 1965). *Louis Antoine v. Lake Charles Stevedores, Inc., Lykes Bros. Steamship Co. and Travelers Insurance Co.*, 249 F. Supp. 290, 1966 AMC 782 (W.D. La. 1965).

5. The mere fact that there may be a long accepted or customary practice for longshoremen of a given stevedore to pull on bands with hand hooks, is not an excuse when it is an improper or unsafe practice, as in this case. *Carban v. Stockard Steamship Corp.*, 173 F.Supp. 845 (E.D. La. 1959). *Coleman v. Jahncke Service, Inc.*, 341 F.2d 956 (5th Cir., 1965); *Schlichter v. Port Arthur Towing Co.*, 288 F.2d 801 (5th Cir., 1961), Cert. denied 368 U.S. 828.

6. The manner of physically handling such an ordinary crate, bale or bundle, is the clearest example of a detail within the special competence and peculiar responsibility of the master stevedore contractor, in this case Strachan Shipping Co. *Knox v. United States*

Lines Co., 294 F.2d 354, 1961 AMC 1708, 1714 (3rd Cir., 1961).

7. The vessel owner cannot be held responsible for the negligence of the stevedore unless the facts indicate that the owner or the vessel's agent knew or should have known of the existence of a dangerous condition, and there was no evidence whatsoever in the case at bar that the defendant-shipowner knew or should have known that the longshoremen were engaging in a dangerous practice. *Knox v. United States Lines Co.*, supra at p. 1710.

8. The operating negligence by the stevedore constitutes a breach of its implied warranty of workmanlike service, and where the breach exposes the ship owner to possible liability, the stevedore remains liable for the expenses it has caused the ship owner, regardless of the outcome of the case. Where the credible evidence indicates that the proximate cause of the ship owner's monetary loss by reason of its forced defense of an action, is the operating negligence of the stevedore, this breach of its warranty subjects it to a claim for costs, disbursements and attorneys' fees. *Guiseppe di Vittorio v. Skiles a/s Siljestad*, 1965 AMC 728 (D.C. N.Y. 1965). See also *Strachan Shipping Co. v. Koniklyke Nederlandsche Stoombout Maatschappis*, 324 F.2d 746 (5th Cir. 1963). Only the potential liability of the vessel owner need be shown to establish the vessel owner's claim of indemnification. *Damanti v. A/S Inger*, 314 F.2d 395 (2 CCA, 1963). If the plaintiff's injury which gives rise to the action is caused by either the plaintiff's own negligence or the negligence of a

fellow longshoreman, the warranty is breached. *Guarracino v. Luckenbach Steamship Co.*, 333 F.2d 646 (2 CCA, 1963); *Massa v. Venezuelen Navigation*, 332 F.2d 779 (2 CCA, 1964); *Damanti v. A/S Inger*, supra. See also the case of *Edward D. Hirstius v. Hess Terminal Corp.*, U.S.D.C., E.D. La., New Orleans Div., Case No. 12932, Civil Action (as yet unreported).

9. Defendant vessel owner is entitled to a judgment against the plaintiff longshoreman, as there is no proof of unseaworthiness of the vessel or the cargo, and the suit of plaintiff is accordingly dismissed with prejudice and costs. Necessarily the third party suit is dismissed as to Strachan Shipping Company, but there is to be judgment in favor of the Bank Line, Ltd., defendant, and against Strachan Shipping Company, third party defendant, for breach of warranty and for costs, disbursements and attorneys' fees, and if the amount so due cannot be agreed upon by the parties concerned, the matter will be set down for hearing at a later date.

A decree and final judgment may be entered accordingly.

New Orleans, Louisiana, December 28, 1966.

(Signed) HERBERT W. CHRISTENBERRY
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24488

MOSE REED,

Appellant,

versus

MV FOYLEBANK, her engines, tackle, apparel, and furniture, and BANK LINES LIMITED, and STRACHAN SHIPPING COMPANY,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(August 29, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and SINGLETON, District Judge.

SIMPSON, Circuit Judge: On the morning of October 16, 1962, appellant and four other longshoremen were loading crates of pulpboard aboard the M/V

Foylebank.[1] Each crate weighed approximately 1100 pounds and was encircled by seven steel bands. The crate in issue was marked with the notation "USE NO HOOKS". The crew was not furnished with any mechanical devices or other implements such as a fork lift truck, crow bars, "greasy pigs"[2] rollers, pry bars or jacks, to move the crates; the longshoremen had only their hand hooks to assist in the movement. The crates were lowered into the hold by winch and cargo boom and were then to be moved to the wings by the longshoring crew.

One of the crates had been loaded and the five-man stevedoring crew was in the process of placing the second one. Mose Reed placed his hand hook behind one of the steel bands and was pulling the crate into place. The steel strap suddenly broke and appellant stumbled backwards, striking his back on the crate that had already been secured. His injuries were serious and painful but need not be further discussed in view of the result below and here.

Appellant brought libel in rem against the vessel and in personam against the owner, Bank Lines, Limited (Vessel). Vessel impleaded Strachan Shipping Company (Stevedore), appellant's employer.[3] The district

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[1]The Foylebank was owned by Bank-Lines, Ltd. of London, England, and was moored in the harbor of New Orleans.

[2]"Greasy pigs" are greased boards placed under cargo to facilitate ease in movement.

[3]Seeking idemnification under Rule 56 of the former Supreme Court Admiralty Rules, now superseded by Rule 14(C) of the revised F. R. Civ. P., effective July 1, 1966. Vessel impleaded Strachan July 18, 1963.

court dismissed the libel with prejudice, and of course likewise dismissed Vessel's indemnification suit against Stevedore.[4] The district court found that there was no proof of unseaworthiness of the vessel or the cargo. Reed is here on appeal from this decree. We affirm the district court.

The first issue before us is whether the operationally negligent acts of Stevedore and the appellant rendered the vessel unseaworthy.

The district court held that the use of hand hooks and the failure to use mechanical devices was "operational neligence" by Stevedore, but that this was insufficient to render the vessel unseaworthy. We concur in this holding. In the instant case the shipowner was not negligent with respect to any duty it owed the appellant. The ship, its equipment and appurtenances were in seaworthy condition, the crew was fit and the method of loading adequate.

Although the loading job could have been done with a fork lift or made easier by using other implements, the failure to provide these things did not render the vessel unseaworthy. The appellant could have used one of the available wooden corners on the crate as was the usual custom.[5] Moreover, according to the

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[4]The dismissal as to Strachan carried with it an award (for breach of warranty of the implied contract to perform its duties in a workmanlike manner) for costs, necessary disbursements in defending Reed's claim and for attorneys' fees. Strachan has not appealed.

[5]The other longshoremen attempting to move the crate placed their hand hooks in wooden corners of the crate frame and not behind a steel band as did Mose Reed.

testimony of one of the witnesses, it was not an uncommon practice in the Port of New Orleans for crates much heavier than the one involved here, up to 3000 pounds, to be moved by hand.

The sole proximate cause of appellant's injury was his own negligent use of the hand hook behind the steel band. The district court found that the appellant was an experienced longshoreman using his hand hook on a crate which had a "USE NO HOOKS" notation stamped on its side. Appellant was the only one to use his hook on the steel band. Furthermore, while pulling on the steel band he assumed an improper stance.

In another attempt to have the vessel declared unseaworthy, the appellant argues that the steel band was defective and/or inadequate. Since the record discloses no evidence of a defect in the band the trial judge correctly ruled against Reed on this issue.[6]

In reviewing the judgment of a district court sitting without a jury in admiralty, we are bound by Rule 52(a), F.R.Civ.P., the "clearly erroneous" rule. We may not set aside factual findings if they have support in the evidence and are not clearly erroneous. We conclude that this standard will not permit setting aside the trial court's determination that the proximate cause of appellant's injury was his negligence and that the steel band was not shown to be defective. We furth-

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[6]Actually the band was lost or misplaced and never tested.

er conclude that neither the non-use of mechanical devices nor the improper loading method used by appellant rendered the vessel unseaworthy.

The second issue is whether the operational negligence, i.e. improper loading plan, of Stevedore and appellant is synonymous with unseaworthiness. If so, operational negligence as a defense to unseaworthiness would be abolished. Moreover, any operational negligence would instantaneously render a vessel unseaworthy even though all the equipment and appurtenances aboard the ship were admittedly seaworthy. This question is decided against appellant in this Circuit. *Grigsby v. Coastal Marine Service of Texas, Inc.*, 5 Cir. 1969, ____ F.2d ____ [No. 22451, May 1, 1969], Part VI, pp. 43-45 of slip opinion; *Luckenbach Overseas Corporation and Isthmian Lines, Inc. v. Unser*, 5 Cir. 1969, ____ F.2d ____ [No. 25344, July 3, 1969] pp. 3-4; and *Duncan v. Transeastern Shipping Corporation*, 5 Cir. 1969, ____ F.2d ____ [No. 26672, July 17, 1969] pp. 2-3.[7]

---

[7]Prior to our recent holdings in this area, there was considerable doubt as to the distinction, if any between "operational negligence" and unseaworthiness. This, of course, raised doubt as to "operational negligence" as a defense for unseaworthiness. The doubt was caused by the per curiam opinion of the Supreme Court in *Mascuilli v. United States*, 387 U.S. 237, 87 S.Ct. 1705, 18 L.Ed.2d 743 (1967). The cryptic citation of *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959) and *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944), in the Court's reversal of *Mascuilli* was the main reliance of appellant's counsel on this appeal. This reliance has now proved misplaced. See *Grigsby*, supra, *Luckenbach*, supra, and *Duncan*, supra.

Finally, appellant contends that the negligence of the stevedore in adopting an improper loading method should be attributed to the shipowner through the doctrine of respondeat superior. In *Neal v. Lykes Bros. Steamship Company*, 5 Cir. 1962, 306 F.2d 313, this Circuit held that "the shipowner is not liable for the negligence of the longshoremen acting as servants or employees of an independent contractor, unless such negligence creates an unseaworthy condition". Since we concur in the trial court's finding of no unseaworthiness, there was no negligence on the part of Stevedore to impute to the shipowner and thus, this contention must fail.

We hold that the operational negligence of Stevedore and Reed did not render the vessel unseaworthy. The judgment of the district court is

AFFIRMED.

SUPREME COURT, U. S.

FILED
DEC 30 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 894

MOSE REED,

Petitioner,

versus

M/V FOYLEBANK, her engines, tackle, apparel and furniture, and BANK LINES LIMITED and STRACHAN SHIPPING COMPANY,

Defendants.

OPPOSITION BY BANK LINES LIMITED TO PETITION OF MOSE REED FOR CERTIORARI

LEON SARPY
J. DWIGHT LeBLANC, JR.
Attorneys for Defendants
1500 National Bank of
Commerce Building
New Orleans, La. 70112

CHAFFE, McCALL, PHILLIPS,
BURKE, TOLER & SARPY
Of Counsel

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

MOSE REED,

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Defendants.

OPPOSITION BY BANK LINES LIMITED TO PETITION OF MOSE REED FOR CERTIORARI

MAY IT PLEASE THE COURT:

NOW INTO COURT comes Bank Lines Limited, claimant of the M/V FOYLEBANK, and files this, its opposition to the petition for certiorari by Mose Reed.

I.

THERE WAS NO IMPROPER PLAN

Petitioner's first thrust seeks to change a conclusion of fact by the District Court and affirmed by the Court of Appeal. The brief for petition for writ of certiorari to review the decision of the Fifth Circuit quotes part

of the opinion of the appellate court to set out the general facts. However, the Fifth Circuit specifically stated in its opinion as follows:

> "The ship, its equipment and appurtenances were in seaworthy condition, the crew was fit and *the method of loading adequate.*" (Emphasis supplied) 415 F. 2d 838, (5 Cir. 1969).

The Fifth Circuit confirmed the finding of fact which is final unless petitioner can prove that the finding was manifestly erroneous. This petitioner has failed to accomplish this. None of the vessel's gear failed, and none of the crew was in anywise negligent.

Counsel for petitioner attempts to insert or create the impression that there was an improper loading plan. This is done by relating the word "plan" to the trial judge's findings of fact where the word plan does not appear and attempts to give the impression that the trial judge found that an erroneous or faulty plan was used by the stevedores. The district judge did not find any improper loading plan. On the contrary, he found that Mose Reed was the only longshoreman who used his hook in an improper manner by pulling on the steel bands (Finding of Fact No. 5). The judge further explained that the use of a hand hook on the wooden crate corner was not an improper use of the hand hook, and that none of the other longshoremen who used hand hooks pulled on the steel bands and that all used the hand hooks by inserting them into the wooden crate corners (Finding of Fact No. 5). The trial court specifically found that the proximate

cause of the accident was not the loading plan, but the use by appellant of his hand hook on the steel band which caused the band to be "fractured, kinked or cut", and this is the reason the band parted (Finding of Fact No. 11).

Hence, an improper plan of loading was never found, but only that Mose Reed, petitioner herein, used his hand hook improperly by placing it under the steel band and pulling on the band instead of the wooden corners (Finding of Fact Nos. 5, 8, and 11). It is especially clear in this case that one was not to use hand hooks on the steel bands because of a notation on the packages "Use No Hooks" (Finding of Fact No. 4). It is not disputed that this crate was to be moved only eight to ten feet once landed, and it is clear from the testimony that longshoremen moved heavy crates up to 3,000 pounds short distances without the use of machinery (Transcript of trial, Page 5).

We therefore submit that the trial court held only that the use of a hand hook by Mose Reed, petitioner herein, kinked or cut the band, and that this act was the cause of the band parting and, further, that the band in question was only for containing the cargo on the wooden skid (Finding of Fact Nos. 10 and 11). Therefore, the use of a hand hook was the improper act, and this was not part of the plan of the stevedores to move the crate in question. The determination of putting the hand hook under the steel band was solely a decision reached by the petitioner. None of the other longshoremen so acted.

This court has found that there is no duty on the part of the vessel to provide an accident-free ship. *Mitchell v. Trawler Racer*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960). This is a question of fact, and this court has stated that in viewing a judgment of a trial court sitting without a jury in Admiralty, the Court of Appeal may not set aside the judgment below unless it is clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 20, 99 L. Ed. 20, 24 (1954). The Fifth Circuit affirmed the trial court's decision and therefore followed this court's directions.

We therefore respectfully submit that there was no improper plan used by the stevedores, but only the negligence of one individual, the plaintiff himself, in carrying out a proper plan.

II.

OPERATIONAL NEGLIGENCE IS NOT PER SE UNSEAWORTHINESS AND THERE WAS NO NEGLIGENCE OR UNSEAWORTHINESS

Each case depends on the facts submitted to and found by the trial judge. Counsel for petitioner attempts to interpret the case of *Mascuilli v. United States*, 387 U.S. 237, 87 S. Ct. 1705, 18 L. Ed. 743 (May 22, 1967) so that any form of operational negligence creates unseaworthiness. This theory has not been accepted by even the Second Circuit as the per curiam decision shown in the petition for rehearing in *Candiano v. Moore-McCormack Lines, Inc.*, 386 F. 2d 444 (2 Cir. 1967) wherein the court discusses the present status

of the law and indicates that an unseaworthy condition was created prior to the accident thereby changing their original interpretation of *Mascuilli*. In the instant case there is no unseaworthy condition which was created.

Further, this court has consistently denied certiorari in cases involving operational negligence and has allowed the circuit courts decision (and the trial courts decision) to remain undisturbed.

After the *Mascuilli* decision, which was decided on May 22, 1967, this court denied a petition for rehearing on October 9, 1967, in *Foster v. Lykes Bros. SS Co.*, 389 U.S. 889, 88 S. Ct. 15. On June 5, 1967 (two weeks after the *Mascuilli* decision) the Second Circuit's opinion in *Fenton v. A/S Glittre*, 370 F. 2d 146 (2 Cir. 1966) this court denied petition for writs of certiorari, 387 U.S. 944, 87 S. Ct. 2077. Petition for writ of certiorari to review this court's decision in *Antoine v. Lake Charles Stevedores, Inc.*, 376 F. 2d 443 (5 Cir. 1967) was denied on October 9, 1967, 389 U.S. 869, 88 S. Ct. 145. Further, a petition for writ of certiorari to review the decision in *Dugas v. Nippon Yusen Kaisha*, 378 F. 2d 271 (5 Cir. 1967) was denied on December 18, 1967, 389 U.S. 1021, 88 S. Ct. 592. In the last mentioned case this court permitted the filing of an amicus curiae brief by the American Trial Lawyers Association which specifically urged the court to reverse Dugas on the basis of *Mascuilli* but this court refused to grant certiorari.

We therefore respectfully submit that the court should similarly deny certiorari in this case which, in effect, would confirm this court's decision in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960) wherein the court provided that the ship owner does have a duty to provide a seaworthy vessel, and that this is an absolute duty, but further held that a vessel has a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.

CONCLUSION

Because of the reasons stated above, we respectfully submit to the Court that this is a case in which there was no improper loading plan and is a case of pure, instantaneous operational negligence on the part of the petitioner herein and that his own negligence of placing his hand hook under the wire band in question and jerking on same was the sole cause of the accident and the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

_____

LEON SARPY
and

J. DWIGHT LE BLANC, JR.
Of Counsel
CHAFFE, McCALL,
PHILLIPS, BURKE, TOLER
& SARPY
1500 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
529-3121

PROOF OF SERVICE

I, Leon Sarpy, attorney for Bank Lines, Ltd., claimant of the M/V FOYLEBANK, and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing brief in opposition to petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit on:

JOHN R. MARTZELL, Esq.
UNGAR, DULITZ & MARTZELL
328 Chartres Street — Suite 100
New Orleans, Louisiana 70130

STUART A. McCLENDON, Esq.
520 Imperial Office Building
3301 North Causeway Boulevard
Metairie, Louisiana 70002

by mailing a copy thereof, postage prepaid, addressed to their respective offices, this ____ day of December, 1969.

LEON SARPY

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FILED
MAR 19 1970
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 894

MOSE REED,

Petitioner,

versus

MV FOYLEBANK, her engines, tackle, apparel, and furniture, and BANK LINES LIMITED, and STRACHAN SHIPPING COMPANY,

Defendants.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PURSUANT TO RULE 58 OF THE SUPREME COURT

UNGAR, DULITZ & MARTZELL
328 Chartres Street-Suite 100
New Orleans, Louisiana 70130
Telephone: 523-6504
Attorneys for Petitioner

IN THE
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NO. 894

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PETITION FOR REHEARING ON PETITION FOR CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PURSUANT TO RULE 58 OF THE SUPREME COURT

Jurisdiction

The jurisdiction of this Court was invoked pursuant to Title 28, Section 1254(1) United States Code. The Petition for Certiorari was docketed in this Court on November 28, 1969. Certiorari was denied on February 24, 1970. This Petition for Rehearing is permitted by Rule 58, Supreme Court Rules.

Intervening Circumstances
Supporting Petition for Rehearing

One of the two questions presented by the instant Petition for Certiorari was stated as follows:

> "(2) Has the defense of operational negligence as a defense to an action based on unseaworthiness been eliminated by the decisions of this Court in *Waldron v. Moore-McCormack*, 386 U.S. 724 and *Mascuilli v. United States*, 387 U.S. 237?"

This question was raised by the Trial Court's Finding of Fact No. 15 as follows:

> "15. The plaintiff Mose Reed is not entitled to judgment as he has not proved the vessel was in any way unseaworthy. The improper method of handling the crates is operational negligence for which no recovery can be allowed under the law against the vessel owner."

and the opinion of the United States Court of Appeals for the Fifth Circuit in *Reed v. M/V Foylebank* (5 Cir.) 415 F.2d 838 at 840 as follows:

> "The second issue is whether the operational negligence, i.e. improper loading plan, of Stevedore and appellant is synonymous with unseaworthiness. If so, operational negligence as a defense to unseaworthiness would be abolished. Moreover, any operational negligence would instantaneously render a vessel unseaworthy even though all the equipment and

appurtenances aboard the ship were admittedly seaworthy. This question is decided against appellant in this Circuit. *Grigsby v. Coastal Marine Service of Texas, Inc.* 5 Cir. 1969, ____ F.2d ____ [No. 22451, May, 1, 1969], Part VI, pp. 43-45 of slip opinion; *Luckenbach Overseas Corporation and Isthmian Lines, Inc. v. Usner,* 5 Cir. 1969, ____ F.2d ____ [No. 25344, July 3, 1969] pp. 3-4; and *Duncan v. Transeastern Shipping Corporation,* 5 Cir. 1969, ____ F.2d ____ [No. 26672, July 17, 1969] pp.2-3.[7]

"[7]Prior to our recent holdings in this area, there was considerable doubt as to the distinction, if any between 'operational negligence' and unseaworthiness. This, of course, raised doubt as to 'operational negligence' as a defense for unseaworthiness. The doubt was caused by the per curiam opinion of the Supreme Court in *Mascuilli v. United States*, 387 U.S. 237, 87 S.Ct. 1705, 18 L.Ed.2d 743 (1967). The cryptic citation of *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959) and *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944), in the Court's reversal of *Mascuilli* was the main reliance of appellant's counsel on this appeal. This reliance has now proved misplaced. See *Grigsby*, supra, *Luckenbach*, supra, and *Duncan*, supra."

Certiorari on the question of "operational negligence" as affected by *Mascuilli v. United States*, 387 U.S. 237 was denied by this court on February 24, 1970.

On February 27, 1970, three days later, this Court Granted certiorari in *Joseph Charles Usner v. Luckenbach Overseas Corporation*, No. 675 October Term, 1969 wherein the certified questions were as follows:

> "(1) Did *Mascuilli v. United States*, 387 U.S. 237, 87 S.Ct. 1705 abolish the defense of operational negligence in an action based on unseaworthiness?
>
> (2) Does operational negligence at the moment of injury render the vessel unseaworthy?
>
> (3) Has the Supreme Court rejected the distinction between operational negligence and unseaworthiness?"

Should this Court answer any or all three of the certified questions in *Usner* in the affirmative, Petitioner herein may win his lawsuit instead of losing it, if, but only if, his lawsuit is alive when the decision of this Court in *Usner v. Luckenbach* is rendered. Petitioner has argued the position that operational negligence was unseaworthiness consistently through Trial Court, Court of Appeal, and this Court by Petition for Certiorari beginning with the trial of this matter on July 25 and 26, 1966. Indeed, the *Reed* and the *Usner* cases have moved through the appellate levels of the Federal Courts almost side by side to such a degree that certiorari was denied in one and granted in the other within three days.

Petitioner respectfully represents that the grant of certiorari in *Usner v. Luckenbach,* No. 675 subsequent to the denial of certiorari in the instant Petition is both an intervening circumstance of substantial effect and other substantial grounds available to petitioner although not previously presented as contemplated in Rule 58(2), Supreme Court Rules. Both Petitioners are longshoremen injured by the operational negligence of their stevedore-employer in the Port of New Orleans. The cases involve the same legal question appropriately raised by the facts and the decisions of the Courts below. Both Petitioners certified the same questions to this Court. Subsequent to the denial of certiorari in the instant Petition, but within the time permitted for Petition for Rehearing, this Court granted certiorari in *Usner v. Luckenbach.*

Petitioner respectfully submits to this Court that it would be inappropriate to grant a hearing before this Court on a controlling question of law and deny a similar hearing to a party petitioning for hearing at the same time on the same point of law. Particularly is this so when the effect of the denial of the petition effectively forecloses the rights of the party denied the hearing regardless of the eventual decision on the legal issue.

Surely no inequity will result if Mose Reed is given a hearing on a question subsequently certified by this Court. Surely no inequity will result if the final mandate of this Court on the instant Petition is withheld pending the ruling in *Usner v. Luckenbach.* However, a considerable inequity may result if, eight years

after his serious injury, but after his rights are foreclosed beyond recall, Mose Reed is told by this Court in *Usner v. Luckenbach* that he was right all along, but to no avail.

Respectfully submitted,

UNGAR, DULITZ &
MARTZELL
328 Chartres Street-Suite 100
New Orleans, La. 70130
Telephone: 523-6504
Attorneys for Petitioner

John R. Martzell

CERTIFICATE OF COUNSEL IN COMPLIANCE WITH RULE 58, SUPREME COURT RULES

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is limited to the grounds specified in Rule 58(2), Supreme Court Rules.

John R. Martzell

PROOF OF SERVICE

I, John R. Martzell, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Mr. J. Dwight LeBlanc, Jr.
CHAFFE, McCALL, PHILLIPS, BURKE,
TOLER, HOPKINS & SARPY
1500 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

Mr. Stuart A. McClendon
520 Imperial Office Building
3301 N. Causeway Boulevard
Metairie, Louisiana 70002

by mailing a copy thereof, postage prepaid addressed to their respective offices, this ____ day of March, 1970.

_____

John R. Martzell